



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 81”B” OF 2019

REPUBLIC.....APPELLANT

VERSUS

GRACE KANARIO.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. P.M Wechuli RM in Tigania CR No.276 of 2015 on 16/11/2018)

JUDGMENT

- 1. Grace Kanario ('the respondent')** was charged with the offence of assault causing actual bodily harm contrary to **Section 251 of the penal code** wherein it was alleged that on 8/1/2015 at Maundu Village, Nkomo location in Tigania West District within Meru County, jointly with another not before court, she unlawfully assaulted Charity Ntinyari by cutting her using a panga on the left shoulder and bit her right hand fore-finger, thereby occasioning her actual bodily harm.
- The respondent denied the charges and in the ensuing proceedings, the prosecution paraded 4 witnesses in support of its case after which the respondent was put on her defence. In her defense, the respondent gave a sworn statement against which no cross examination is recorded to have been done. In a reserved judgment, she was acquitted in accordance with section 215 of the CPC.
- The prosecution's case was set off by the evidence of **PW1, Charity Ntinyari**, the complainant and the respondent's sister in law. She recalled passing through the respondent's farm as she went home and met the respondent who was waiting for her with another person. The two when greeted, responded with a threat to cut her, held her and indeed cut her with a panga. The respondent then bit her finger and injured her on the shoulder. She reported to Nchiru police station and then went to the hospital for treatment.
- During cross examination, she confirmed that Jacob Thurania, Kititole and others who are around the farm witnessed the incident. She further confirmed that the respondent was her sister in law, as she was married to her brother Linus. She further stated that her brother namely David assaulted her by hitting her on the shoulder. After she reported him to the police and he was arrested, he asked for forgiveness and she forgave him. She denied having any differences with the respondent. Their father Jacob Thurania, who was also present, tried to have them resolve the case at home but the respondent declined. She denied knowing whether the respondent had reported to the station. During re-examination, she denied assaulting the respondent, and insisted that it was the respondent who had assaulted her on the shoulder.
- PW2 Jacob Thurania** confirmed that both the complainant and the respondent were his daughter and daughter-in-law. On the material day, he sent the complainant to get him a panga for cultivating and that as she passed through the respondent's land a fight ensued which he watched from a distance, and when he went there, he found one of them had pushed the other down. Although he did not want to go near them, he told them to stop. He told Kijitole that Moene was injured and then took the complainant to report to Nchiru police station and later to Nchiru hospital for stitching of the cut wound.
- During cross examination, he confirmed that the respondent was his daughter in law because she was married to his son Linus and that he had in the past tried to reconcile the complainant and the respondent to no avail. He also stated that he saw them fighting while they were holding each other, although he did not know how the fight had started. He concluded that it was the complainant who reported and that he did not know why the complainant was not charged as well.
- PW3 John Kiptole** testified that the complainant was their family member while the respondent was married to their family. On the material day, he had gone to visit PW2 on his farm and that as they talked, there were screams from the complainant and PW2 told him that the respondent and the complainant were fighting. Although he did not go to the scene with PW2, he heard screams. The matter was later reported to Nchiru police station after which the complainant went to Nchiru hospital for treatment.
- During cross examination, he confirmed that although he heard screams, he did not know how the fight had started or see who were fighting. He stated that he did not know if the two had a grudge, although he confirmed that he had initially recorded that the two had a long

time grudge related to family issues.

9. PW4 Geoffrey Mutheru, a clinical officer at Miathene Hospital, examined the complainant who had a cut wound on the left side of the clavicle bone, scratch marks on the face and a bite wound on the 2nd finger of the right hand. He classified the degree of injury as harm and produced the complainant's P3 form, filed on 19/1/2015. He opined the probable types of weapon to have been sharp and blunt.

10. During cross examination, he confirmed that he was the one who had treated the complainant and clarified that the treatment notes of the complainant had been left at the hospital, as is the norm nowadays.

11. In her defence, the respondent told the court that the complainant found her cultivating her farm with a panga and a slasher when one David warned her that she was about to be cut, and on turning around, she saw the complainant also with a panga. The complainant then grabbed her on the neck, hit her on the head and she fell in a ditch. She stated that there were people there including Josphat and Hezekiah when the fight occurred. She said that the matter was reported to the police who advised them to reconcile. She confirmed that there existed a grudge between the complainant and her, because her husband, who was the area manager, had arrested the complainant's husband with a stolen goat.

12. The foregoing is the entirety if the evidence the trial court analysed and come to the conclusion of acquittal. Dissatisfied with the respondent's acquittal, the prosecution/appellant lodged this appeal setting out 6 grounds of appeal which I have collapsed into 3 being that; the trial court erred in law and fact by dismissing the charges on flimsy technicalities without considering the ingredients of the offence, that it failed to find that the evidence of the defence did not shake the prosecution's evidence which was truthful, well corroborated, tight and consistent and lastly that the judgement of the trial court was against the weight of evidence.

13. The matter was agreed to be canvassed by way of written submissions, which were filed by the appellant only. In the submissions, the appellant contend that the injuries as contained in the medical report were corroborated by PW4. The trial court was faulted for considering irrelevant facts not before it and dismissing the case on flimsy technicalities devoid of sound judicial principles. According to the appellant, the incident was witnessed by PW2 who positively identified the respondent as the perpetrator. It relied on the cases of **Njoroge v R (1987) KLR 19, Okemo v R (1972) E.A 32, Ndaa v R (1984) KLR and Rex v Donovan (1934) 2KB 498** in reiteration of the law that a first appellate court has the duty to re-evaluate and re-examine the entire evidence and come to own conclusions while taking into account that it did not record the evidence and observe the demeanor of the witnesses. The mandate of the court has been repeatedly defined to be: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570). It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424.)”[1]

14. Having taken cognizance of the courts mandate, I do find the issues for determination are whether the offence of assault causing actual bodily harm was proved beyond reasonable doubt, and if the trial court erred in its assessment of the evidence, when it doubted if it was indeed the respondent who had assaulted the complainant.

15. The fundamental ingredients of the offence faced by the respondents were spelt out in the case of **Ndaa v Republic [1984] KLR** to be *assaulting the complainant or victim, and occasioning actual bodily harm.*

16. On whether the complainant was assaulted by the respondent, the complainant, **PW1** during cross examination stated that, **“David hit me on the shoulder. He is the one who started to assault me.”** PW2 stated that, **“when I was far, I saw people fighting. I went and found one of them had pushed the other down. I told them to stop. I told Kijitole that Moene is injured should go to hospital.”**

17. On her part, the respondent told court that, **“David told me that I was about to be cut. I turned and saw Ntinyari with a panga. She hit me on the head. I fell in a ditch. She grabbed me on the neck. The complainant has been having a dispute with us. My husband is an area manager. He arrested the complainant's husband with a stone goat hence the fake charges.”**

18. The respondent's entire evidence, as shown by the record, was not subjected to any cross examination just as nothing is recorded whether the prosecution opted not to cross examine. That is an error that is attributable to none other than the court. The right to cross examine a witness who has given evidence on oath is an important one to help test the truth in the evidence and enable court establish the truth. The law grants to the adversary the right to choose to cross examine and where one chooses not to cross examine the court must record that election. To the extent that the same was not recorded, I find that there was a fundamental failure by the court which I consider to have vitiated the entire trial. In this I am bound by the decision of the court of Appeal in **Moses Ndichu Kariuki Vs Republic Criminal Appeal No. 228 of 2008 (2009) eKLR**, the Court of Appeal considered the provisions of section 77 of the former Constitution which is similar to Article 50 of the Constitution stated thus:-

“In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied.

19. That was however not one of the grounds of appeal but has emerged from the re-examination of the record by the court. On it alone the appeal would succeed on the basis that there was a mistrial.

20. On the grounds of appeal preferred I do find that at the conclusion of the evidence there was no dispute that there was a fight between the respondent and the complainant on the material day as a consequence of which the complainant sustained bodily injuries assessed by the clinician as harm. While the trial court seems to have appreciated the evidence to have proved assault occasioning bodily harm, it then discounted the liability of the respondent by posing the question if it was the accused who had inflicted the injury. That to this court was an error in that even the respondent in her defence admitted there having been a fight and that her husband David was present. That is the same David the complainant says was first to hit her.

21. The charge facing the accused in fact alleged that the offence was committed jointly with another not before the court. That was equally appreciated by the trial court when the court sought to distinguish what injury was occasioned by David and its extent thus finding a reasonable doubt. That to this court was an obvious error. Once the injury was established and shown to have been occasioned by the respondent, it was immaterial that there was contribution by another not before the court. It was erroneous to seek to assign each of the assailants the extent of their wrong when the other person was not even before the court. I do find that there was no reasonable doubt whether the injury was occasioned by the respondent.

22. The finding of mistrial and that there was an error on the court in reaching a verdict of acquittal should not present any serious contradiction when consideration on when to order retrial is given due regard. The principles remain that a retrial is only available, in general, when the original trial was illegal or defective; but not where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.^[2]

23. When the foregoing principles are applied to the facts of this case particularly the fact that the conflict was between close family member and thus the need to consider affording them a chance to heal, I do consider an order for retrial to be inappropriate. I consider that the evidence on record was sufficient to sustain the charge and support a conviction for which reason I do set aside the acquittal and substitute therewith a finding of conviction.

24. The end result is that the appeal succeeds, the finding of the trial court leading to acquittal is set aside and in its place substituted and order that the respondent stands convicted.

25. The matter is therefore remitted to the trial court, pursuant to section 354 (3)c, with this court's opinion on how to treat the evidence for purposes of sentencing. Let the file be placed before the trial court forthwith but in any event within 14 days from today for that purpose.

DATED SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF NOVEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence

Mr. Maina for the appellant

Ms. Charity Ntinyari – complainant present

No appearance for the respondent (served)

Patrick J.O Otieno

Judge

^[1] **Okeno v Republic (1972) EA 32**

^[2] **John Njenga Kamau v Republic Criminal Appeal No. 203 OF 2016 [2018] eKLR; Zamzam Mohamed v Republic [2019] eKLR;**